

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

_____	x	
	:	
MOUNTAIN VALLEY PIPELINE, L.L.C.:	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	2:17-cv-04214
-vs-	:	
	:	
AN EASEMENT TO CONSTRUCT,	:	
OPERATE AND MAINTAIN A 42-INCH	:	
GAS TRANSMISSION LINE ACROSS	:	
PROPERTIES IN THE COUNTIES OF	:	
NICHOLAS, GREENBRIER, MONROE,	:	
SUMMERS, BRAXTON, HARRISON,	:	
LEWIS, WEBSTER, AND WETZEL,	:	
WEST VIRGINIA, et. al.,	:	
	:	
Defendants.	:	
_____	x	

**TRANSCRIPT OF PREHEARING CONFERENCE  
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.  
UNITED STATES DISTRICT JUDGE  
FEBRUARY 2, 2018**

**APPEARANCES:**

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Proceedings recorded by mechanical stenography,  
transcript produced by computer.

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1 P-R-O-C-E-E-D-I-N-G-S 11:45 a.m.

2 THE CLERK: All rise.

3 THE COURT: Good morning, please be seated.

4 It turns out that we have just two or three too many to  
5 squeeze into the Court's conference room, so we'll conduct  
6 in here.

7 And then I hope that maybe by the time we finish this  
8 conference, there won't be quite so many the next time.  
9 We'll see what happens.

10 And I'm going to ask that the clerk call the case, and  
11 if you'll note your appearances, please.

12 THE CLERK: The case before the Court is *Mountain*  
13 *Valley Pipeline, LLC, versus an easement to construct,*  
14 *operate, and maintain a 42-inch gas transmission line across*  
15 *properties in the counties of Nicholas, Greenbrier, Monroe,*  
16 *and Summers, West Virginia, et. al, Civil Action Number*  
17 *2:17-cv-04214.*

18 Will counsel please state appearances for the record.

19 MS. BAGNELL: Nicolle Bagnell on behalf of  
20 Mountain Valley Pipeline, and I have with me today Steve  
21 Hastings from Mountain Valley.

22 MR. TEANEY: Good morning. I'm Derek Teaney with  
23 Appalachian Mountain Advocates, appearing on behalf of  
24 defendants: Orus Ashby Berkley, Tammy Calpado, Robert M.  
25 Jarrell, Ronald Tobey and Elizabeth Tobey.

1 THE COURT: Thank you.

2 MR. HOWELL: Good morning, Your Honor. Isak  
3 Howell for those landowners, as well as for Mr. Osborne, Mr.  
4 Swami, and certain Zickafoose heirs.

5 THE COURT: Very good.

6 MR. HOWELL: And, I'm sorry, I forgot one family.  
7 And the Boumans.

8 THE COURT: Thank you.

9 MR. CLARKE: Your Honor, Stephen Clarke of  
10 Waldo & Lyle, and with me Mitch Tuggle, on behalf of  
11 Mountain Lair, LLC.

12 THE COURT: Thank you.

13 MS. KIRTLEY: Courtney Kirtley on behalf of Paco  
14 Landing.

15 THE COURT: Thank you.

16 MR. PERSINGER: Howard M. Persinger, III, for Rex  
17 Coal Land Company, Inc., and Warrior Energy, LLC.

18 MR. STEVENS: Joe Stevens, Your Honor,  
19 representing Jim Gore and Norvel Mann, Maury Johnson, a  
20 total of about 25 landowners.

21 THE COURT: Thank you.

22 MR. PATTERSON: May it please the Court, I'm  
23 George Patterson, and I'm appearing on behalf of Western  
24 Pocahontas Properties Limited Partnership.

25 THE COURT: Thank you.

1 MR. STONESTREET: Wayne Stonestreet, Your Honor,  
2 appearing on behalf of Monte and Elora -- I can't pronounce  
3 her name -- Elora McKenzie, Thomas Keener, and the Lacy H.  
4 Toney Farm Trust.

5 THE COURT: Thank you.

6 Let me ask first, Ms. Bagnell, how many of these  
7 landowners or how many parcels are there for whom you've not  
8 received an agreement to settle? I had understood something  
9 that indicated that there were only about 10 percent that  
10 remained at issue, but when you sent this list in, I was  
11 surprised to see how many parcels, as well as how many  
12 individuals there are. And I wonder if you could go over  
13 that for me. It looks like, particularly, in Monroe County,  
14 there are quite a number.

15 MS. BAGNELL: Yes, Your Honor. We have 69 parcels  
16 remaining. We started with 141 in the condemnation action.  
17 The -- our brief did reference that we had settled with over  
18 90 percent of the landowners in West Virginia. That  
19 includes both landowners in the Northern District and the  
20 Southern District and before we filed --

21 THE COURT: Well, if you could just concentrate on  
22 the four counties in the Southern District, that's all I'm  
23 interested in.

24 MS. BAGNELL: 69.

25 THE COURT: And they are 69, what? Parcels?

1 MS. BAGNELL: Yes, Your Honor.

2 THE COURT: And those 69 parcels then have the  
3 number of landowners that you've set forth in the chart that  
4 you just furnished here a day or so ago?

5 MS. BAGNELL: Yes, Your Honor. 97.

6 THE COURT: And thank you for getting that out to  
7 us quickly. So you've got quite a number of outstanding  
8 parcels and individuals to deal with. And it looks to me  
9 like that has to be a whole lot more than 10 percent?

10 MS. BAGNELL: Yes, Your Honor. Again, my  
11 intention in saying the amount we had settled was from prior  
12 to the litigation to today.

13 THE COURT: And so it looks as though there is  
14 quite a bit of work yet to do. When you referred to the  
15 number a moment ago, was it 67?

16 MS. BAGNELL: 69 parcels.

17 THE COURT: 69. And how many were there  
18 originally in those four counties?

19 MS. BAGNELL: Originally, in those four counties,  
20 there were 102.

21 THE COURT: So 102 that you're that -- that  
22 constitutes all of the lands over which those four counties  
23 you need easements?

24 MS. BAGNELL: No, Your Honor. Originally -- I  
25 don't know the number in the four counties. But, initially,

1 when MVP started this process, it needed over a thousand --  
2 it needed access across the pipeline to over a thousand  
3 properties. And it's gained all access to all of them in  
4 West Virginia, except for these 69 in the Southern District,  
5 and then also a few in some -- about 15 in the Northern  
6 District.

7 THE COURT: As I understand it, with all the rest,  
8 you have reached an agreed settlement?

9 MS. BAGNELL: That's correct, Your Honor.

10 THE COURT: You have written contracts with them?

11 MS. BAGNELL: Yes, Your Honor.

12 THE COURT: And it is to purchase the easement for  
13 so many dollars that are specified there. And are those  
14 contracts then still in executory fashion, that is, the  
15 money is still to be paid?

16 MS. BAGNELL: For the vast majority of those, the  
17 money has been paid, Your Honor. It's paid generally when  
18 the agreement is entered into.

19 THE COURT: And so with respect to these that  
20 remain, do you have an estimate of about how many of them  
21 are represented here today?

22 MS. BAGNELL: Yes, Your Honor. Of the 97, Mr.  
23 Howell and Mr. Teaney represent about 13 landowners.

24 THE COURT: When you say of the 97 --

25 MS. BAGNELL: Individuals.



1 THE COURT: All right.

2 MS. BAGNELL: I counted this by the individuals,  
3 not the parcels. So Mr. Stonestreet, who also is  
4 representing Ms. Ziegler's clients, represents four. Mr.  
5 Persinger, Ms. Kirtley, Mr. Patterson, and Mr. Clarke each  
6 represent one, and there are 30 unrepresented individuals.

7 THE COURT: Thank you. I think that covers that  
8 part. I want to ask a question or two about individual  
9 matters, the first of which is Mountain Lair. I had gotten  
10 the impression from something that there was a concern over  
11 the location of the easement on the Mountain Lair property,  
12 and thought that it had been worked out. Obviously, it  
13 hasn't been or you wouldn't be here today.

14 So what's the status of that?

15 MR. CLARKE: Your Honor, Stephen Clarke for  
16 Mountain Lair. There was surveying that was done with my  
17 client's permission, I believe in November and December of  
18 last year, and at the time of that surveying, the MVP  
19 representatives indicated that they were -- they believed  
20 they needed to do a reroute across my client's property.  
21 But since that date, we haven't had any future  
22 communications from MVP as to a reroute. I don't know if  
23 one is going to be forthcoming or not.

24 THE COURT: So what, in your view, needs to be  
25 done?

1 MR. CLARKE: I'd like to know from MVP, either  
2 whether they're proceeding along the route that they filed  
3 under or if they have a proposed new route; I'd like to get  
4 a copy of the plat showing that.

5 MS. BAGNELL: We're proceeding under the route  
6 that was originally included in the FERC Certificate.

7 THE COURT: Well, if then MVP does just that, is  
8 there an issue?

9 MR. CLARKE: I mean, if they're going to do that,  
10 that's what they're going to do, Your Honor. I think my  
11 client's concern, as was expressed in our brief and in his  
12 declaration, relates to some physical features on his  
13 property. But if MVP is saying they're going to cross the  
14 sinkholes, then they're going to cross those sinkholes.

15 THE COURT: Is that the understanding?

16 MS. BAGNELL: Yes, Your Honor. My understanding  
17 was, after the surveying, the construction and projects team  
18 met to see if construction on the FERC designated route was  
19 viable, and they determined that it was, and a reroute would  
20 not be needed.

21 THE COURT: And so, apparently, then they're going  
22 forward on that basis. And does that leave you then in a  
23 posture simply of determining what just compensation would  
24 be?

25 MR. CLARKE: I mean, I think my client still has

1 defenses, and we've opposed MVP's motions for a number of  
2 grounds that are set forth in our brief. But, ultimately, I  
3 don't think that the routing issue is going to be one of  
4 those grounds, if that's what MVP is saying today.

5 THE COURT: Very good. Thank you.

6 MR. CLARKE: Thank you, Your Honor.

7 THE COURT: With respect to Rex and Warrior, what  
8 is the status of that now insofar as your client is  
9 concerned, Mr. Persinger?

10 MR. PERSINGER: Your Honor, we have filed and  
11 fully briefed a motion for Warrior to intervene, which is  
12 currently pending before the Court. I've been engaging in  
13 conversations with Mr. Hastings over the last week that have  
14 really just kind of restarted, and we're attempting to work  
15 a deal out at this point, I think it's fair to say. So  
16 hopefully that will bear fruit.

17 THE COURT: Well, are you making progress?

18 MR. PERSINGER: I feel like we are, but we're  
19 pretty early in the stage. I should know a lot more by next  
20 week, I think. One of the big issues has been whether or  
21 not we're going to negotiate at all. And there seems to be  
22 interest with respect to some negotiation with respect to  
23 the coal at this point. So we'll be working on that today,  
24 I'm sure.

25 THE COURT: Let me ask Ms. Bagnell or Mr. Hastings

1 about that, whichever of you wishes to respond. Does it  
2 look to you as though there is a reasonable avenue for  
3 working the matter out?

4 MR. HASTINGS: Your Honor, I would let Ms. Bagnell  
5 give our legal position on what is involved in the  
6 condemnation. I'm happy to answer the Court's ultimate  
7 question, subject to what I believe she will say when she  
8 talks, is I think we are engaged in discussions for  
9 parameters for an agreement. Whether we get there or not, I  
10 don't know. But I feel comfortable to say there's a good  
11 chance we can work it out with Mr. Persinger's client,  
12 irrespective of what the Court would ultimately rule on the  
13 legal issues for the condemnation.

14 Is that fair?

15 MR. PERSINGER: Yes. I agree with that.

16 THE COURT: If it is workable, do you have a  
17 prediction as to time?

18 MR. PERSINGER: I think we should know pretty  
19 quickly whether we're going to be able to work it out. I  
20 would say within a week. We had engaged in negotiations  
21 back in the spring and so there is a framework that already  
22 exists, and if we're both willing to buy into the framework,  
23 I think we'll know pretty quickly.

24 THE COURT: Well, suppose we leave it at this, if  
25 that sounds reasonable to you, that the Court will withhold

1 ruling on the motion to intervene for another week, and  
2 let's see whether or not you get --

3 MR. PERSINGER: I think that's a good idea, Your  
4 Honor.

5 THE COURT: -- if you can get the matter worked  
6 out.

7 MR. HASTINGS: I have no issue with that, Your  
8 Honor.

9 THE COURT: Does that sound reasonable to you?

10 MR. HASTINGS: Yes, sure.

11 MR. PERSINGER: Yes.

12 THE COURT: I think, ultimately, though, you're  
13 calling upon Ms. Bagnell to make the decision, and does that  
14 seem reasonable to you?

15 MS. BAGNELL: Yes, Your Honor.

16 THE COURT: Very good. We'll handle it that way.  
17 And, Mr. Patterson, with respect to your client, what  
18 contact, if any, have you had with MVP about that matter?

19 MR. PATTERSON: Your Honor, Mr. Hastings sent me  
20 an e-mail, I think, yesterday, asking for a meeting. So  
21 that's the first contact we've had on the issue. And, you  
22 know, obviously, we'll -- we responded that we'd set up a  
23 meeting as soon as we could. And when would depend on what  
24 days the Court -- if the Court is going to set the hearing  
25 next week, whether we're working for the hearing or working

1 for the meeting.

2 THE COURT: Well, does it look as though that  
3 matter is one where it is worth pursuing, as well?

4 MR. HASTINGS: Candidly, Your Honor, I think we  
5 are a lot farther apart from the starting process -- I think  
6 Mr. Patterson would probably agree -- than we are with Rex  
7 and Warrior. I think the issue we have and he has is we  
8 don't believe the coal is part of the condemnations, and  
9 that's the legal issue, setting aside what is or is not in  
10 the condemnation. Our parameters with the coal companies,  
11 quite frankly, we're going to treat them all the same. If  
12 we can come to some arrangement on how -- if we would impact  
13 coal, how we would address that.

14 We're open to the Court, and I can represent Mr.  
15 Patterson, I mentioned to him briefly, about five till 11:00  
16 this morning, to Mr. Patterson and said, hey, this is kind  
17 of how we're thinking about structuring something. Can you  
18 talk to your folks in advance of our meeting to do that.

19 We're happy to be open to have those discussions. But  
20 right now, they have a lot of properties that they have  
21 concerns about. I've dealt with Mr. Patterson on their  
22 clients before, and it's been a struggle, at times, for us  
23 to come to an agreement. I'm not casting stones as to whose  
24 fault that may have been, but it historically has been a  
25 process.

1 I don't think it will be fair to say that we're going  
2 to resolve that issue in the next week or two, Your Honor.

3 THE COURT: Are there multiple properties involved  
4 in this matter, Mr. Patterson?

5 MR. PATTERSON: Yes, Your Honor, there are. There  
6 are numerous tracts, both in the north and the south, more  
7 than a hundred, is my recollection.

8 MS. BAGNELL: Your Honor. Three parcels have been  
9 condemned that are owned by Western Pocahontas Properties in  
10 the Southern District, and one in the Northern District.

11 THE COURT: And so let me ask what you're speaking  
12 about, Mr. Patterson, if MVP thinks there is only four, of  
13 what are you speaking?

14 MR. PATTERSON: Well, Your Honor, her position, as  
15 I understand it, is they're not taking any coal. And so my  
16 client owns some surface. So she's speaking only of the  
17 surface. My client also owns numerous parcels of coal,  
18 which our position is, in some of them, we actually have the  
19 right to keep the pipeline from being built, and others,  
20 coal will be damaged, and ultimately coal will be sterilized  
21 as a result of the pipeline.

22 So those issues we have briefed on both in terms of  
23 response to her -- their summary judgment motion, as well as  
24 a motion to dismiss or deny their injunction, because they  
25 have not joined these tracts and other owners who own coal.

1 THE COURT: Thank you. Let me ask what the  
2 plaintiff's response is to that?

3 MS. BAGNELL: Well, Your Honor, as the Fourth  
4 Circuit made clear in U.S. versus 21.54 acres, it's the  
5 condemnor who defines and has the sole power to determine  
6 the extent of the taking.

7 MVP has identified the parcels where it is taking  
8 surface. It has not condemned the right to coal or the  
9 right to subjacent support in this action.

10 If, after the -- after the pipeline is constructed,  
11 Western Pocahontas believes that its coal has been impacted,  
12 it can, of course, file its own inverse condemnation action  
13 or otherwise seek damages.

14 But in terms of this litigation that we're here for  
15 today, those other properties are not part of this case.

16 THE COURT: Let me ask whether or not there is any  
17 road to resolving the issues raised by Mr. Patterson in this  
18 matter?

19 MR. HASTINGS: Your Honor, setting the surface  
20 issue aside, because I think Mr. Patterson's real issue is  
21 with the coal, the discussions that I mentioned we're  
22 talking about with Mr. Patterson and his client involve all  
23 of the hundred properties or whatever it would be. So we're  
24 not limiting our discussions that we want to have on the  
25 three surface tracts, if that's the Court's question.



1           So what I said earlier about engaging in discussions,  
2           it would cover all of their concerns.

3           THE COURT: Very good. Thank you.

4           Well, the Court will hear from you further, in the  
5           event you've been able to explore the matter further, at the  
6           time we have the hearing in this matter.

7           And so make that a target and see if in the meantime  
8           you can speed along the discussions. And you may soon have  
9           a better grip on whether or not there is really any prospect  
10          of working anything out.

11          MS. BAGNELL: Yes, Your Honor.

12          THE COURT: And so let me ask then, is it the case  
13          that otherwise, that is, except I think perhaps for Mr.  
14          Patterson and except for Mr. Persinger, this is a matter  
15          that all of those present will have an interest in at  
16          hearing on the motion for which we're appearing now.

17          Is that correct from your standpoint, Mr. Patterson,  
18          and, Mr. Persinger, for that matter?

19          MR. PERSINGER: Yes, Your Honor. That's my  
20          understanding.

21          THE COURT: Very good.

22          MR. PATTERSON: Your Honor, I'm not sure I  
23          understand the Court's question. Obviously, my client has  
24          some surface tracts and a great number of coal tracts.

25          THE COURT: And so you have, what, three tracts in

1 the Southern District, and one in the Northern District, I  
2 think is what was said?

3 MS. BAGNELL: Yes.

4 THE COURT: And you have a specific interest in  
5 those?

6 MR. PATTERSON: Yes.

7 THE COURT: And there is no agreement with regard  
8 to any of them?

9 MR. PATTERSON: No, there is not.

10 THE COURT: Let's go back to those four alone for  
11 the moment. Is there some prospect that you're going to  
12 work that out independently of the hundred properties you're  
13 talking about, or is it all going to have to be in the same  
14 ball of wax?

15 MR. PATTERSON: We haven't broached that issue at  
16 all.

17 MR. HASTINGS: I'm sorry --

18 THE COURT: Go ahead.

19 MR. HASTINGS: My understanding, Your Honor, is  
20 till now, until recently, MVP hasn't been willing to talk  
21 about the coal value. We have not made them any offers on  
22 the coal. I think that's fair. And Mr. Patterson's client  
23 hasn't wanted to talk about the surface without the coal.  
24 We're certainly willing to separate those issues.

25 THE COURT: Very good. Well, it's understood, so

1 it's really up to you, Mr. Patterson, to decide whether or  
2 not you wish to proceed on that basis.

3 MR. PATTERSON: Well, Your Honor, I'd have to  
4 speak to my client about that.

5 THE COURT: Sure.

6 MR. PATTERSON: And I'm not -- so, I'm sorry, but  
7 I cannot respond at this point. I mean, the pipeline itself  
8 will cross through our -- through coal owned by, in the  
9 Southern District, WPP, LLC, which is not a party to this  
10 case at this point.

11 So our position is, they'll essentially be mining our  
12 coal in places. And so our position is that certainly they  
13 should have joined WPP, LLC to the case. And because -- if  
14 the Court grants the injunction, they may have rights with  
15 respect to the surface, but they still don't have the rights  
16 they need to build the pipeline, because they have no right  
17 to dig our coal, is the simplest analysis.

18 And then, additionally, it's going to cause coal that  
19 could be mined by surface mineable methods, as well as deep  
20 mineable methods, to be impacted and reserves sterilized .

21 So, in our view, it's not much different than an  
22 analysis of the surface. If you're going to use somebody's  
23 property to build a pipeline, you should join them in this  
24 case.

25 So that's our position, Your Honor.

1 THE COURT: Thank you. And so with that -- and  
2 I'll ask whether there is any further response by anyone?

3 MS. BAGNELL: No, Your Honor. I just would rely  
4 on what I said before and on our briefing on their motion to  
5 dismiss.

6 THE COURT: Thank you. I think what we should  
7 turn to now is the scope of the hearing that's to take place  
8 with respect to the motion at issue. And I would ask the  
9 parties, having already had the experience of going through  
10 this in some depth or at least as much depth as these  
11 matters seem to involve in Virginia, what can be done to  
12 expedite the hearing in this case? And what evidence do you  
13 contemplate needs to be presented; what length of time do  
14 you think it's going to take?

15 Who wishes to address it first?

16 MS. BAGNELL: I'm happy to address it from our  
17 perspective, Your Honor.

18 THE COURT: Go ahead.

19 MS. BAGNELL: As you know, evidence has already  
20 been presented in both Virginia and in the Northern District  
21 of West Virginia. We don't anticipate the evidence here  
22 being much different or different at all from either of  
23 those hearings. So I think Your Honor could rely on both  
24 the transcripts, if you so chose to, and the declarations  
25 that have already been submitted in this case.

1           If Your Honor would choose to have a hearing, I think  
2 MVP will call two, perhaps three witnesses; Mr. Cooper, our  
3 appraiser, and Mr. Wagner.

4           Based on the two previous hearings, I would say that  
5 our, at least, our direct testimony would take about half a  
6 day.

7           THE COURT: That is, for, what, two witnesses?

8           MS. BAGNELL: Yes.

9           THE COURT: And that would be Cooper and Wagner?

10          MS. BAGNELL: Cooper and the appraiser.

11          THE COURT: Well, who is Wagner?

12          MS. BAGNELL: Wagner is the head of land for MVP.  
13 He's another MVP employee that we may choose to call. We  
14 don't anticipate calling him at this time.

15          THE COURT: I see. So it's Cooper and the  
16 appraiser?

17          MS. BAGNELL: Yes.

18          THE COURT: And the appraiser have a name yet?

19          MS. BAGNELL: Mr. Goldman, Todd.

20          THE COURT: Here in Charleston?

21          MS. BAGNELL: Yes.

22          THE COURT: And so you expect to use Cooper and  
23 Goldman?

24          MS. BAGNELL: Yes.

25          THE COURT: And half a day. And what will be

1 their testimony, to what will it relate?

2 MS. BAGNELL: Well, Mr. Cooper's testimony will be  
3 with regard to the project as a whole and with regard to the  
4 irreparable harm that MVP will incur should it not be given  
5 access in time to complete tree clearing by the March 31st  
6 deadline.

7 And Mr. Goldman will submit evidence with regard to the  
8 bond -- the bond, should an injunction be issued.

9 THE COURT: I see. And so with that, that will be  
10 what you anticipate the sum total of Mountain Valley's  
11 evidence to be?

12 MS. BAGNELL: Yes, Your Honor.

13 THE COURT: With respect to the bond, do you know  
14 what Mr. Goldman's testimony will cover?

15 MS. BAGNELL: Yes. Mr. Goldman has done -- looked  
16 at comparable sales and done appraisal work to estimate a  
17 value of the diminution in the -- in the value of the  
18 properties as a result of the taking. And I don't know the  
19 exact number figure that he has come to, but if Your Honor  
20 -- I believe it was around \$450,000 for all of the remaining  
21 parcels.

22 THE COURT: Now, you're saying a bond, for what  
23 sum?

24 MS. BAGNELL: Well, Your Honor, the appraisal  
25 report amount for purposes of the bond hearing is roughly

1       \$450,000 -- \$412,000. Mr. Hastings is correcting me.

2               THE COURT: So \$412,000 is the appraised value of  
3 the 69 properties?

4               MS. BAGNELL: It is a -- yes, it's based on Mr.  
5 Goldman's opinion of the value, based on the work that he's  
6 done.

7               THE COURT: And the value that he's done, the work  
8 that he's done, is that of an appraiser for those  
9 properties?

10              MS. BAGNELL: Yes. Although his testimony will be  
11 that he did not actually walk on the properties. So, though  
12 he's done comparable values and looked at comparable values  
13 and he's been to each of the properties, his report is  
14 restricted in that manner.

15              THE COURT: You say he's been to the properties,  
16 but he hasn't been on them?

17              MS. BAGNELL: That's right.

18              THE COURT: So he's observed the properties?

19              MS. BAGNELL: Yes, Your Honor.

20              THE COURT: To which the easement is running? But  
21 he hasn't seen all of that over which the easement runs?

22              MS. BAGNELL: That's correct, Your Honor.

23              THE COURT: And he's drawn down comparables?

24              MS. BAGNELL: Yes.

25              THE COURT: That will have him testifying that the

1 total of the 69 parcels is of a value of \$412,000?

2 MS. BAGNELL: Yes, Your Honor. Not the parcels as  
3 a whole, but just the value of the taking.

4 THE COURT: Yes, of what's taken. So that would  
5 be that which is taking and any damage to the residue all  
6 included?

7 MS. BAGNELL: That's his diminution in value  
8 number, yes, Your Honor.

9 THE COURT: And so he's strictly going to testify  
10 as to a diminution in value; that is, without the pipeline  
11 the property is worth X; with the pipeline, it's worth Y?

12 MS. BAGNELL: Correct, Your Honor.

13 THE COURT: And the difference is \$412,000?

14 MS. BAGNELL: Yes.

15 THE COURT: And is it the case that there is any  
16 property being taken among these 69 parcels that is of a  
17 value of less than \$3,000?

18 MS. BAGNELL: I do not know the answer to that off  
19 the top of my head, Your Honor.

20 (An of-the-record discussion was held between Attorney  
21 Bagnell and Mr. Hastings.)

22 MS. BAGNELL: Some of the appraised values are  
23 less than \$3,000. There is no property for which the  
24 landowners argue that the value is less than \$3,000,  
25 however.



1 THE COURT: But his assessment is less than  
2 \$3,000?

3 MS. BAGNELL: For some parcels.

4 THE COURT: Yes. And I believe then that covers  
5 what I wanted to inquire of you about. And if you have  
6 anything to add, I'd be pleased to hear it.

7 MS. BAGNELL: No, Your Honor. Thank you.

8 THE COURT: Thank you.

9 Mr. Teaney, do you mind to speak to the evidence to be  
10 presented at this hearing. And, first of all, you might  
11 refer to that which Ms. Bagnell has just stated.

12 MR. TEANEY: Certainly. I believe that Ms.  
13 Bagnell has accurately characterized what we would  
14 anticipate their case to be, about a half a day, with two  
15 witnesses; Mr. Cooper going to harm, and then Mr. Goldman on  
16 the appraisal.

17 We would cross-examine Mr. Cooper, because we believe  
18 that the evidence will show that MVP will not be able to  
19 carry its burden on the irreparable harm prong of the  
20 injunctive analysis.

21 In defendant's case, several of the firms, the clients  
22 represented by Mr. Stevens, by Mr. Clarke, by Mr. Howell and  
23 myself, have retained an appraiser who would testify as an  
24 expert in rebuttal to Mr. Goldman about his methodology in  
25 conducting the appraisals.

1           The bond amount in this case is not a typical  
2 preliminary injunction bond. It's not just required by the  
3 rules, it's required by the Fifth Amendment to the  
4 Constitution. And so we believe that important that the  
5 bond be based on reliable evidence such that reasonable,  
6 certain and adequate assurance of just compensation can be  
7 presented.

8           So for that purpose, we've retained an expert appraiser  
9 to rebut Mr. Goldman's testimony and we would like to put  
10 him on as an expert. I believe that testimony could be  
11 presented in a half hour or so.

12           Additionally, we would like to call an expert  
13 hydrogeologist to testify about this project's impact on  
14 Karst topography, specifically in Summers and Monroe County,  
15 and on the landowners who are affected. We believe that  
16 goes to the balance of harm or to the harms of the  
17 defendants' element of the injunctive analysis.

18           In addition, the Appalachian Mountain Advocates and  
19 Howell law office clients would call -- we intend to put  
20 forth the testimony of four. I'll let Mr. Howell address  
21 this.

22           MR. HOWELL: Yes. We'd like to put on four  
23 landowners to speak to the harm to their properties. And we  
24 anticipate that that would be 15 minutes per landowner. But  
25 we'd like to call Mr. Berkley, Ms. Tobey, Mr. Jarrell, and

1 Ms. Calpado for that purpose.

2 THE COURT: And to what are they going to testify?  
3 Saying the harm to their property. What do you mean by  
4 that?

5 MR. HOWELL: Harm to water resources, harm to  
6 forests on the property, harm to unique features on the  
7 property, such as river crossings, and harm to improvements  
8 on the property, such as homes.

9 THE COURT: Very good. And with that, let me go  
10 back to Mr. Teaney. I think you said a hydrologist would be  
11 offered, and whom else? An appraiser?

12 MR. TEANEY: An appraiser. Yes, we foresee two  
13 experts, an expert appraiser, an expert hydrogeologist, and  
14 then the four landowners that Mr. Howell discussed.

15 THE COURT: So those two, from your standpoint,  
16 plus the four landowners, correct?

17 MR. TEANEY: That would be our evidentiary  
18 presentation, yes, Your Honor.

19 THE COURT: Let me respond to -- have you respond  
20 to that, Ms. Bagnell.

21 MS. BAGNELL: Yes, Your Honor. We believe that  
22 the testimony presented by all of these witnesses would  
23 be -- would not be relevant in this context, because it  
24 would simply amount to collateral attacks on the FERC  
25 Certificate, particularly the hydrogeologist testifying

1 about Karst. And the impacts on the landowners from the  
2 pipeline was specifically addressed by the FERC, and a  
3 determination was made in their order. And, likewise, the  
4 testimony by the landowners, again, would be either  
5 collateral attacks or simply talking about damages that  
6 would occur whenever the pipeline is put into place, which  
7 is not the purpose of the hearing on immediate access, Your  
8 Honor.

9 THE COURT: And so you take exception to the  
10 offering of any of the testimony that has been suggested,  
11 except for appraisal?

12 MS. BAGNELL: Yes, Your Honor.

13 THE COURT: Thank you. Anything further on that  
14 point?

15 MR. TEANEY: If I may respond to Ms. Bagnell's  
16 argument? The position that MVP takes would essentially  
17 render an injunction automatic. This argument attempts to  
18 deprive the landowners, the defendants in this action, of  
19 the opportunity to present evidence on a very important  
20 prong of the injunctive analysis, which is harm to the  
21 nonmoving party.

22 If the FERC Certificate is conclusive on that, then  
23 that renders injunction essentially automatic in these  
24 cases, and that is contrary to all of the Supreme Court law  
25 in the reporters. And so, for those reasons, we believe it

1 is appropriate for the landowners to testify to the harm  
2 that will occur to them.

3 We believe that it is more than just a question of  
4 timing of harm for two reasons: The first is, this pipeline  
5 certificate is subject to challenge in other courts, so this  
6 pipeline may not be built if those other proceedings result  
7 in a vacation of the FERC Certificate. But, also, we  
8 believe that there is a time value of having environmental  
9 resources on your property, of having a standing forest, of  
10 having an intact stream, of enjoying your resources that  
11 should be part of the balance of the equities in an  
12 injunction case.

13 You know, the argument that the FERC Certificate is  
14 conclusive and is not subject to collateral attack may be  
15 true in the legal proceedings under Section 7 of the Natural  
16 Gas Act, but the Natural Gas Act doesn't contemplate a  
17 quick-take or an early possession.

18 So in order to do that, MVP has already veered off  
19 of -- out of the Congressional statutory scheme and into the  
20 Rules of Civil Procedure and of judicial authority. They've  
21 invoked this Court as a chancellor.

22 We believe that as chancellor, you can hear all the  
23 evidence on all of the prongs of the injunctive analysis.

24 THE COURT: It seems to me as though Ms. Bagnell  
25 is correct that FERC has made the decision and if you're

1 going to get relief from it, you need to either get it from  
2 FERC or from one of the appellate courts to which you can  
3 appeal.

4 With respect to the landowner testimony, the Court is  
5 satisfied to hear one of them, if they wish to come in, and  
6 it may be an exemplar for others. And if that testimony is  
7 offered, the Court will receive it.

8 The Court will also, of course, receive the testimony  
9 of the appraisers. But beyond that, it seems to me that the  
10 offer goes beyond the purpose of the hearing.

11 MR. TEANEY: Understood, Your Honor. For point of  
12 clarity, do I understand that the ruling is we may present  
13 the appraiser. The Court will not allow the testimony of  
14 the hydrogeologist. And we may present one example  
15 landowner of the four that we named?

16 THE COURT: That's correct.

17 MR. TEANEY: Thank you. If I may note an  
18 objection for the record.

19 THE COURT: Sure.

20 MR. TEANEY: We'll proceed accordingly. Thank  
21 you.

22 THE COURT: And then let me ask who next wishes to  
23 offer evidence, if at all, at the hearing?

24 MR. PATTERSON: Your Honor, Western Pocahontas has  
25 two witnesses, one of which will testify regarding the

1 damage to the coal; another one will testify as negotiations  
2 prior to the hearing. Mr. Hastings told the Court earlier  
3 that no offer had been made with respect to the coal. If  
4 they're willing to stipulate to that, then we'd need  
5 probably one witness.

6 THE COURT: With respect to the three tracts in  
7 the Southern District, the surface of which is being taken,  
8 do I understand that they're not offering any evidence as to  
9 them, but, rather, you're offering evidence as to coal  
10 property that is not being taken?

11 MR. PATTERSON: Your Honor, I think that -- we do  
12 have some evidence with respect to the tracts that the  
13 surface of which has been named in this proceeding. The  
14 majority of the evidence would be with respect to the fact  
15 that WPP, LLC has rights within the surface to prevent  
16 pipeline from being drilled, and because -- because it would  
17 damage our coal, we'd like to present that evidence.

18 So with respect to the surface tracts, we do have some  
19 evidence but that would not be the thrust of what -- of what  
20 we would be presenting.

21 THE COURT: If you -- well, go ahead, Mr.  
22 Persinger.

23 MR. PERSINGER: I was just going to say that Rex  
24 and possibly Warrior's evidence would be along the same  
25 lines as Mr. Patterson's. We would have one expert who

1 would testify regarding the impact of the construction on  
2 the coal reserve, and what -- and then would give valuation  
3 evidence regarding the value of the coal that would be  
4 sterilized that goes to the issue of the bond. And then  
5 probably another -- well, definitely another witness that  
6 would talk about the, the mining operation, where the -- the  
7 state of the permit, and how soon mining would occur, and  
8 give the evidence regarding negotiation, as well.

9 THE COURT: Well, let me note, in both those  
10 instances, the Court does not expect to hear evidence on  
11 properties that are not being taken. And I go back to the  
12 question that was posed earlier.

13 Is there any evidence with respect to the surface  
14 tracts, being the three in number in the Southern District,  
15 that is being taken by Mountain Valley as to your client,  
16 Mr. Patterson?

17 MR. PATTERSON: No, Your Honor. But we'd like to  
18 -- if we would -- we would like to make some record. And if  
19 an objection does it, it does it, but --

20 THE COURT: Well, you can make your objection now  
21 and I'll be happy to have that recorded. What I'm after now  
22 is finding out what is the evidence going to be at this  
23 coming hearing? And so far, I haven't heard any basis for  
24 it.

25 MR. PATTERSON: Yes, Your Honor. For example,



1       there is a deed to WPP, LLC from the surface owner of a very  
2       large tract, thousands of acres. This deed provides that  
3       their surface rights are subject to mining rights, full and  
4       mining rights, whatever is necessary and convenient,  
5       together with the rights of buildings things, to strip mine,  
6       auger mine, in pits, to build extraction plants, treatment  
7       processing facilities. In other words, the full right to  
8       use the surface for whatever purposes that is needed for the  
9       coal.

10               THE COURT: Well, I understand that encumbers the  
11       surface. But the question is whether or not you have any  
12       evidence with respect to the surface? And the fact that it  
13       is burdened with these other factors is not a part of this  
14       proceeding.

15               MR. PATTERSON: Thank you, Your Honor. May I just  
16       make one more little point? I understand what you've said.  
17       I'd just like to go on and say --

18               THE COURT: Go ahead.

19               MR. PATTERSON: -- that this deed says that the  
20       surface rights won't unreasonably interfere with the coal  
21       rights. In other words, the coal owner has the primary  
22       rights to the surface. This is a coal-mining tract where  
23       the coal rights as to the surface exceed the rights of the  
24       surface owners. And I've already made my point with respect  
25       to actual physical damage to the coal.

1 THE COURT: Thank you.

2 And, Mr. Stevens.

3 MR. STEVENS: Your Honor, on behalf of my clients,  
4 I had wanted to offer the testimony of landowners, Jim Gore,  
5 Norvel Mann, and Maury Johnson. I understand the Court's  
6 ruling in Mr. Teaney's cases, and I'm not sure the Court is  
7 going to want me to offer those.

8 THE COURT: Well, you want to choose one of those  
9 landowners to appear?

10 MR. STEVENS: Yes, Your Honor. I would choose  
11 Norvel Mann. Thank you.

12 THE COURT: Very good.

13 And, Ms. Kirtley, what is your situation?

14 MS. KIRTLEY: As far as the hearing on summary  
15 judgment, I don't anticipate calling any witnesses. I may  
16 have questions for plaintiff's witnesses.

17 THE COURT: Thank you.

18 And, Mr. Clarke, do you and Mr. Tuggle have anything  
19 further on Mountain Lair?

20 MR. CLARKE: Your Honor, I think -- I talked  
21 briefly with Ms. Bagnell and Mr. Hastings about this before.  
22 If the Court would allow my client to just submit a  
23 declaration in lieu of testifying, I think that would  
24 expedite things. And it would really just be about the harm  
25 to its property from allowing entry immediately as opposed

1 to at some later point in time with regard to his ability to  
2 adjust his property fencing and that kind of thing.

3 THE COURT: What do you then anticipate that  
4 declaration to say?

5 MR. CLARKE: I think it would essentially say that  
6 he's been told by MVP representatives that he won't have  
7 access across the construction area during times of actual  
8 construction, which will essentially kind of sever a large  
9 portion of his property that's not subject to the taking,  
10 not within the easements taken, but it will sever his access  
11 to a large portion of his property and will require him to  
12 take some necessary steps to relocate some of his livestock,  
13 maybe bring in some additional feed for the cattle that will  
14 remain on the property that he can access, depending upon  
15 when the construction takes place.

16 THE COURT: And so is that a concern only during  
17 the period of construction on the Mountain Lair property?

18 MR. CLARKE: That's -- I mean, that's, you know,  
19 that's where the biggest impact that I've just talked about  
20 would occur, yes.

21 THE COURT: How lengthy is the declaration?

22 MR. CLARKE: I would guess it would be a page and  
23 a half, two pages. Fairly brief, Your Honor.

24 THE COURT: Well, if you would submit that.

25 MR. CLARKE: Absolutely. I'd be happy to.

1           THE COURT: And I would ask whether or not the  
2           declaration could be under affidavit, and, if so, whether or  
3           not Mountain Valley would accept it for admission in the  
4           case?

5           MS. BAGNELL: Your Honor, I would like to see the  
6           contents of the affidavit before we agree to it being  
7           submitted, simply because what I've heard to date sounds  
8           like this would just be damages that would occur whenever  
9           the pipeline is constructed and so would not be relevant as  
10          to immediate access. But subject to that objection, Your  
11          Honor, I'm certainly willing to review it.

12          THE COURT: Well, it may be that the easiest  
13          solution to this is to prepare the declaration, furnish a  
14          copy of it in advance, and then you could furnish it again  
15          at the hearing and the Court will hear any objection to it  
16          at that time.

17          MR. CLARKE: That sounds fine. Thank you, Judge.

18          THE COURT: And, Mr. Stonestreet.

19          MR. STONESTREET: Thank you, Your Honor.

20          I am appearing on behalf of the McKenzies, the Keeners,  
21          and the Lacy H. Toney Farm Trust. Each of those landowners  
22          would like to make a statement. There is three on behalf of  
23          the Farm Trust. And my understanding, the Court wants to  
24          limit that to one. I can't pick the one at this point. The  
25          two that I represent both work. Depending on the date of

1 the hearing that is set, I don't know which one would be  
2 available to testify.

3 THE COURT: You don't need to designate the  
4 individual right now.

5 MR. STONESTREET: Thank you, Your Honor. And for  
6 Mr. Keener, and for the McKenzies, Your Honor, we would  
7 offer similar testimony from landowners and will attempt to  
8 elicit from one, as you requested. Also, we would seek to  
9 enter some expert evidence with regard to the value of the  
10 land being impacted by an early intervention pursuant to the  
11 request by MVP.

12 I don't know the extent and I don't know who -- I'm  
13 representing Anna Ziegler here and two of her clients here  
14 today, Your Honor. And it's my understanding that they  
15 would like to reserve the right to call expert witnesses in  
16 rebuttal to what's offered by MVP and any other witnesses  
17 that the other parties would identify.

18 And in lieu of them being present, we would also like  
19 to make a declaration as previous counsel has made under the  
20 same auspices, giving MVP the right to review it and make a  
21 statement as to whether they're willing to accept it.

22 THE COURT: With respect to the landowners, if you  
23 want to select one of your clients to testify, the Court  
24 will hear that testimony. If you have an expert appraiser  
25 that you wish to present, you may do that as well. And

1 beyond that, it seems to me that that covers the group that  
2 you've referred to.

3 MR. STONESTREET: Yes, Your Honor. It would be  
4 along the same issues as these gentlemen in front of me are  
5 offering with regard to the impact on their property, their  
6 forest, their lands, their farming activities and different  
7 activities that are taking place. Plus, the crossing is  
8 upstream from where the residence is. And their residence  
9 has a couple springs that provide water to the residence.  
10 And I don't know, they may want to offer testimony as to the  
11 potential impact immediate access would have on their  
12 springs, I don't know. So there may be some testimony along  
13 those lines.

14 THE COURT: Excuse me. Let me ask Ms. Bagnell if  
15 you'd respond.

16 MS. BAGNELL: Yes, Your Honor. With regard to  
17 impacts on streams and springs; likewise, that would be a  
18 collateral attack on the FERC Certificate. And I think, as  
19 regard to the other damages, we would argue for the same  
20 bases I've already stated that that would be irrelevant.

21 I do have a question about the appraiser, Your Honor.  
22 I'm not aware that Ms. Ziegler has identified any appraiser  
23 on behalf of her clients. We did request that information  
24 during the expedited discovery process. And my  
25 recollection, although it may not be perfect, Your Honor, is

1 that no one was disclosed.

2 Are you aware who?

3 MR. STONESTREET: I do not recall the name. I saw  
4 a response to discovery requests where individual names were  
5 listed, and I did not bring that. It should be in the  
6 discovery. Okay.

7 MS. BAGNELL: Okay. Thank you.

8 THE COURT: Well, so far as the appraiser is  
9 concerned, see if you can work out an understanding with Ms.  
10 Bagnell who that individual --

11 MR. STONESTREET: Yes, Your Honor. Plus there is  
12 ongoing negotiations, Your Honor.

13 THE COURT: Pardon?

14 MR. STONESTREET: These parties are still  
15 negotiating with MVP. And if those come to fruition, then  
16 it would be a moot issue, Your Honor.

17 THE COURT: Well, I think it would please everyone  
18 in the room if you have that worked out by the time we have  
19 the hearing.

20 MR. STONESTREET: Thank you, Your Honor. I think  
21 you're right.

22 THE COURT: And so we're still left with your  
23 selection of the single landowner, and to speak to the value  
24 of the land, and an appraiser, who would cover how many  
25 properties generally you have in mind. But there seems to

1 be some rub on the appraiser, and I think you need to clear  
2 that with Ms. Bagnell first. She indicates that this was  
3 the first she's heard of it. But I think she said that  
4 she'd be pleased to speak to you about it.

5 MR. STONESTREET: Certainly.

6 THE COURT: So see if you can work that out.

7 MR. STONESTREET: Certainly, Your Honor.

8 MS. BAGNELL: Yes, Your Honor.

9 THE COURT: And beyond that, I would ask whether  
10 or not any of you have anything further to suggest that  
11 would have to do with either the timing of or the content of  
12 the hearing?

13 MR. TEANEY: May it please the Court. Two issues  
14 on that. It occurred to me after I heard Mr. Clarke that  
15 perhaps I should ask for permission to submit declarations  
16 on behalf of the non-testifying landowners. I believe some  
17 of them submitted declarations in support of the motion.  
18 We'd be happy to follow the same procedures if the Court  
19 would entertain those declarations.

20 THE COURT: And so let me ask, Ms. Bagnell, what  
21 response you have to that.

22 MS. BAGNELL: Yes, Your Honor. Again, I would ask  
23 that we be able to review the declarations that Mr. Teaney  
24 is speaking of and then, pending that review, perhaps make  
25 objections. But that procedure is fine.



1 THE COURT: In that matter, the Court's already  
2 noted that you propose to furnish an appraiser.

3 MR. TEANEY: That's correct.

4 THE COURT: And also one landowner.

5 MR. TEANEY: Yes, Your Honor.

6 THE COURT: As between the two of you. And it  
7 seems to me that that should cover it. If you want to  
8 prepare a single declaration and furnish it in addition to  
9 that to Ms. Bagnell for her review, and then perhaps on to  
10 the Court, even though it may be under objection, you may do  
11 so.

12 MR. TEANEY: Thank you, Your Honor.

13 THE COURT: Now then, let me ask you this, you  
14 prepare that single declaration, what length do you  
15 contemplate?

16 MR. TEANEY: The declarations that we have  
17 previously submitted or prepared in cases like this run from  
18 2 to 5 pages, I believe. We will certainly strive to keep  
19 it, you know, as succinct as possible.

20 THE COURT: Well, if you would hold it within that  
21 range.

22 MR. TEANEY: Certainly.

23 THE COURT: Anything else?

24 MR. TEANEY: There is, Your Honor. Your Honor, I  
25 believe, inquired about issues regarding the timing of the

1 hearing. When the Court directed the parties to appear for  
2 this hearing on Wednesday --

3 THE COURT: And I apologize for two things,  
4 really; one, the relative briefness of the notice, the  
5 limited time, but I thought you were probably eager to get  
6 going with this, and I was hoping that you would be amenable  
7 to it. And I expect you probably had to juggle your  
8 schedules to get here, and I appreciate your doing it.  
9 Again, I apologize for such short notice.

10 The other thing I wanted to apologize to you for is  
11 being so late this morning. I was in a pretrial conference  
12 and it just went on and on and on. And so it just took a  
13 lot of time, and I'm sorry that you were delayed.

14 Please go ahead.

15 MR. TEANEY: Certainly, Your Honor, and there are  
16 no apologies necessary. But I wanted to note that as soon  
17 as we received word that the Court wanted to have this  
18 conference and to possibly schedule a hearing next week, we  
19 contacted Mr. Rice, our expert appraiser, who informed us  
20 that next week he's entirely booked, involving family health  
21 issues and previous commitments that he cannot get out of.

22 He has confirmed for me that he is available the week  
23 of February 12th through the 16th and can make himself  
24 available any day that week. Unfortunately, he's not  
25 available next week.

1           So we would respectfully request, because of the  
2           importance of the bond issue and the constitutional nature  
3           of it, that we be allowed to present the expert we  
4           previously retained and engaged to review this and present  
5           evidence on our behalf.

6           THE COURT: Has he testified in any of the other  
7           proceedings for you?

8           MR. TEANEY: He testified in our behalf in the  
9           Northern District proceedings on January 23rd. You know,  
10          there are specific issues within the appraisal such that I  
11          do not believe that his testimony as to the appraisals that  
12          were submitted in that that case by a different appraiser,  
13          not Mr. Goldman, would be -- I don't believe they would be  
14          equally applicable to Mr. Goldman's testimony.

15          THE COURT: It would have been my hope that we  
16          could have this hearing by next Friday.

17          MR. TEANEY: Understood, Your Honor. And I regret  
18          to report this news to you.

19          THE COURT: Is there just no way he could be made  
20          available for that day?

21          MR. TEANEY: I've asked him that question several  
22          times, and he tells me that it cannot happen.

23          THE COURT: Thank you.

24          MS. BAGNELL: Your Honor, if I might, just as a  
25          suggestion. We have not spoken about this previously, but

1 it's my understanding from Mr. Rice's testimony at the  
2 previous hearing, that he does not have any opinions of  
3 value as to the taking. He is simply going to provide  
4 testimony with regard to our appraiser.

5 So perhaps this is something that could be dealt with  
6 in an affidavit or -- and then, perhaps, be subject to the  
7 cross-examination from the Northern District. I'm not sure  
8 exactly how we could work it out. But given the very  
9 limited scope of the testimony of this appraiser, it seems  
10 like we might be able to do something.

11 MR. TEANEY: Ms. Bagnell is correct that Mr. Rice  
12 will not be offering independent opinions of values of the  
13 property; instead, he will be testifying about the  
14 methodology used by Mr. Goldman.

15 I suppose we could endeavor to present an affidavit,  
16 but, again, with his schedule next week being what it is, I  
17 don't know what kind of time frame we would be able to  
18 generate that affidavit, whether it would be in advance of  
19 hearing or after. You know, we are open to creative  
20 solutions. But I would note that, you know, because of the  
21 constitutional importance of the bond, the -- if this Court  
22 were to issue an injunction, the bond must be based on  
23 reliable evidence, and so we think it crucial that we have  
24 the opportunity to present that evidence.

25 THE COURT: What is the prospect that you could

1 prepare what you believe to be a counter-affidavit, and then  
2 once Mr. Goldman has testified, have your witness on the  
3 following Monday to modify it, and then to submit it if you  
4 can gain the agreement of Ms. Bagnell to receive it?

5 MR. TEANEY: Let me make sure I understand the  
6 proposal. It would be that we prepare a counter-affidavit  
7 during the time between now and the hearing. We provide  
8 then, after Mr. Goldman testifies, he modify that affidavit  
9 and then submit it the following Monday?

10 THE COURT: Yes. Prepare the affidavit, and you  
11 could present what you have to Ms. Bagnell, and then go  
12 ahead with the hearing, perhaps, on Friday, and then on the  
13 following Monday, he could modify that to the extent he  
14 needs, and we'll just have to hope that it doesn't bring in  
15 any new matter that Ms. Bagnell has to respond to, in which  
16 event she may have to use the same mechanism to respond to  
17 it. Of course, the Court would rather have the witness  
18 present testifying. It may be that we can make an exception  
19 in this case to that limited extent. But I do want to hear  
20 from both of you on it.

21 MR. TEANEY: Certainly. I think my concern would  
22 be the logistical challenges of having Mr. Rice have the  
23 ability to read or hear Mr. Goldman's testimony. I'm not  
24 sure how rapidly a transcript could be generated and, you  
25 know, it would be based on attorney's notes, absent a

1 transcript. And so I think there is a logistical challenge  
2 there with a Monday deadline. I don't know how quickly a  
3 transcript could be generated such that Mr. Rice would have  
4 the ability to review it.

5 MS. BAGNELL: Perhaps, Your Honor, we could just  
6 hear from Mr. Rice the following week and have him appear  
7 live, because perhaps it would be too difficult to do this  
8 by declaration, but if we limit the testimony only to Mr.  
9 Rice and have the remainder of the hearing this coming week.

10 THE COURT: Let me ask whether or not it is the  
11 case that you've already heard this witness once?

12 MS. BAGNELL: Yes, Your Honor.

13 THE COURT: And so to whom was that witness  
14 responding or countering? Was it Mr. Goldman or someone  
15 else?

16 MS. BAGNELL: It was the appraiser that we used in  
17 the Northern District.

18 THE COURT: A different person?

19 MS. BAGNELL: It was a different person, yes, Your  
20 Honor, but the reports are substantively the same.

21 THE COURT: Well, it may be that --

22 MS. BAGNELL: And, Your Honor, I'm sorry to  
23 interrupt. But I would say that the majority of the opinion  
24 that was presented by Mr. Rice was stricken by, by Judge  
25 Keeley in the Northern District.

1           MR. TEANEY: If I may respond to that? While it  
2 is true that Judge Keeley struck portions of Mr. Rice's  
3 opinions, I don't think it's fair to characterize it as the  
4 majority. Mr. Rice was qualified as an expert appraiser.  
5 He is an instructor under the Uniform Standards and  
6 Practices for Professional Appraising. To the extent he was  
7 offering opinions about what, the so-called USPAP, those  
8 opinions were admitted.

9           So to the extent that he was testifying about the  
10 so-called Yellow Book or the Uniform Standards For Federal  
11 Land Acquisition, because he had not done a Yellow Book, she  
12 discounted those opinions or struck them in part.

13           But I don't think it would be fair to characterize it  
14 as a majority. But I believe the record would speak for  
15 itself.

16           THE COURT: Ms. Bagnell, if we're going to hear  
17 that witness live on Monday, maybe the best thing to do  
18 would be just have the entire hearing on that day.

19           MS. BAGNELL: Your Honor, based on your order, I  
20 was -- I checked with my witnesses with regard to this  
21 coming week and their availability. I did not ask them  
22 about the following Monday, but I can do so quickly.

23           THE COURT: Let me ask the availability of  
24 everybody else with respect to the witnesses that are  
25 anticipated to be offered for either Friday or Monday, or

1 both? That is, a week from today and the following Monday,  
2 or both?

3 MR. STONESTREET: Your Honor, counsel for the  
4 three parties that we represent will be not available next  
5 Friday. They will be available the following Monday.

6 THE COURT: Who will not be available?

7 MR. STONESTREET: Counsel for the McKenzies,  
8 Thomas Keener, and the Lacy Toney Farm Trust. Counsel will  
9 be available on the following Monday, on the 12th, but not  
10 on the Friday.

11 THE COURT: Of whom are you speaking when you say  
12 "counsel"?

13 MR. STONESTREET: Myself and Anna Ziegler, from  
14 Ziegler & Ziegler.

15 THE COURT: Neither of you are available on  
16 Friday?

17 MR. STONESTREET: No, Your Honor. We are on the  
18 12th, on Monday, Your Honor.

19 MS. BAGNELL: And, Your Honor, just -- this might  
20 make it easier for you. I know that our appraiser is not  
21 available on Friday. He is available -- our witnesses are  
22 available Tuesday, Wednesday, Thursday. And I think other  
23 than -- that works for almost everyone. We discussed it  
24 prior, with a few exceptions, and, of course, Mr. Teaney's  
25 appraiser.



1 THE COURT: When you say Tuesday, Wednesday,  
2 Thursday, of what week?

3 MS. BAGNELL: This coming week, Your Honor.

4 MR. STONESTREET: Counsel would be available on  
5 Tuesday and Wednesday of next week, Your Honor.

6 MR. STEVENS: If I may, Judge. I will not be  
7 available on Tuesday, the 6th. I would be available on  
8 Wednesday.

9 THE COURT: We're down to Wednesday. Is everybody  
10 available that day?

11 MR. TEANEY: With the exception of our appraiser,  
12 Mr. Russ Rice.

13 THE COURT: Yes, with that exception.

14 MR. TEANEY: Yes.

15 THE COURT: That may work. Just one moment.

16 (Pause.)

17 THE COURT: We'll be just a moment.

18 MR. TEANEY: While we're waiting, Your Honor, may  
19 I note something?

20 THE COURT: Yes.

21 MR. TEANEY: I am not an appraiser, so I do not  
22 understand all of their guidelines and principles. I do  
23 recall something that an appraiser told me once that  
24 suggested that a written statement of a review may require  
25 some -- may require some sort of further certification or --

1       there is a difference between a written review and an oral  
2       review of someone else's work. And I need to clarify that  
3       to understand what -- whether a request that a written  
4       declaration or affidavit be provided by our expert would  
5       somehow run afoul of his ethical rules. I need to  
6       understand that concept.

7               THE COURT: Thank you.

8               From what's been stated, Wednesday seems to be the one  
9       date when everyone's available. And so we're going to  
10      proceed on Wednesday. And I would suggest that we begin at  
11      9:30, so that we can be sure to get finished.

12              And I would ask the parties whether or not you can be  
13      here at 9:30 on Wednesday for the day?

14              MS. BAGNELL: Yes, Your Honor.

15              MR. TEANEY: I can attend at 9:30, yes, sir.

16              MR. STONESTREET: Yes, Your Honor.

17              MR. CLARKE: Yes.

18              MR. STEVENS: Yes, Your Honor.

19              MS. KIRTLEY: Yes.

20              MR. PERSINGER: Yes, Your Honor.

21              MR. PATTERSON: Yes, Your Honor.

22              THE COURT: Thank you. I believe that covers that  
23      aspect of it then. So we'll proceed on Wednesday, instead.  
24      And it's with the understanding that we may have this  
25      addendum to come in through Mr. Teaney. And I am going to

1 ask you to work with Ms. Bagnell on that, if you would, as  
2 well.

3 MR. TEANEY: We certainly will, Your Honor. I  
4 guess I can sort this out afterwards, to inquire with the  
5 court reporter about the timing about how quickly we can get  
6 a transcript of Mr. Goldman's testimony for the review of  
7 Mr. Rice following the hearing.

8 THE COURT: And then I'd like for you to speak to  
9 Ms. Bagnell and see whether or not the statement of that  
10 individual is one that could be produced by affidavit for  
11 entry into the record.

12 MR. TEANEY: Certainly, Your Honor. We will  
13 investigate that possibility and strive to achieve it.

14 THE COURT: If not, there is no alternative than  
15 simply hearing it. So see what you can do in that regard.

16 I suppose a further alternative would be a deposition,  
17 but that's something we can speak further about when you've  
18 had a chance to develop it further with Ms. Bagnell.

19 MR. TEANEY: Yes, Your Honor.

20 THE COURT: And so with that, do the parties have  
21 anything further at this time?

22 MR. PATTERSON: I'd just like to note my exception  
23 to the Court's rulings. As I understand it, you've excluded  
24 evidence of coal or evidence with respect to the Plum Creek  
25 Timberlands deed, and I wanted to except to that ruling.

1 THE COURT: Indeed. And the Court, of course,  
2 understands that, in your case, what has been condemned is  
3 the surface of certain lands for which you want to present  
4 evidence as to coal, and the Court has excluded that from  
5 this hearing.

6 MR. PATTERSON: Thank you, Your Honor.

7 MR. PERSINGER: Same objection for me, Your Honor.

8 THE COURT: With the same result.

9 MR. PERSINGER: Exactly. But I would note that we  
10 would like the opportunity to present evidence from the  
11 landowner, who is also the surface owner, as well. We could  
12 probably do that by affidavit, as the others have, as well,  
13 if that would be more convenient.

14 THE COURT: Well, I suppose that if you have  
15 evidence as to value of land being taken in this proceeding,  
16 that the Court would be amenable to hearing the landowner.

17 MR. PERSINGER: Right.

18 THE COURT: But the affidavit that we're getting  
19 is coming from an appraiser who is undertaking to rebut Mr.  
20 Goldman, and that one exception has been made; although, it  
21 has not been finalized yet, it's still for Ms. Bagnell and  
22 Mr. Teaney to work out, but I don't want to extend that  
23 further than that point. So if you have a live witness who  
24 wants to come in and testify on Wednesday, you may do so.

25 MR. PERSINGER: Very good.

1 THE COURT: And, of course, that has to do with  
2 property that is in this case being taken.

3 Yes.

4 MS. BAGNELL: One further point -- one further  
5 question, Your Honor, as to the landowner affidavits. I  
6 think now it sounds like there will be four or five. And I  
7 was just wondering if we could see those by at least Tuesday  
8 morning prior to the -- so I have an opportunity to review  
9 them. We can perhaps come to an agreement before the  
10 hearing on Wednesday.

11 THE COURT: You're speaking then about any of  
12 these where the Court has allowed a witness and it comes in  
13 the form of a declaration, you want to see those beforehand?

14 MS. BAGNELL: Yes, Your Honor.

15 THE COURT: And so, can those who would be  
16 providing, not live testimony, but a declaration with  
17 respect to a landowner only, be in a position to furnish  
18 them by Tuesday, noon, to Ms. Bagnell?

19 MR. HOWELL: For our part, yes, sir.

20 THE COURT: Thank you.

21 MR. STONESTREET: Yes, Your Honor.

22 MR. CLARKE: Yes, Your Honor.

23 MS. KIRTLEY: And, Your Honor, I don't know if I  
24 will or if my client will want to, but may I reserve the  
25 right for my client, Paco Land, to also submit to the

1 Court--

2 THE COURT: Indeed.

3 MR. PERSINGER: Your Honor, that's what I was  
4 referring to, as well.

5 THE COURT: Well, I think we are back to  
6 permitting you to do that now.

7 MR. PERSINGER: Okay, thank you.

8 MR. STEVENS: Judge, on behalf of my clients, I  
9 move that we be permitted to file one declaration in  
10 accordance with the Court's rulings.

11 THE COURT: I think we're up to about six now.

12 MR. STEVENS: I am sorry. Thank you.

13 THE COURT: So it's going to be a busy afternoon  
14 of reading, Ms. Bagnell, on Tuesday.

15 MS. BAGNELL: Yes, Your Honor.

16 MR. PATTERSON: I do not -- I do not know if my  
17 clients would like to file an affidavit with respect to the  
18 surface, but, if they do, I would appreciate the Court  
19 entertaining it.

20 THE COURT: Very good. And so I think then we've  
21 streamlined this about as much as can be.

22 And would there be any other comment or suggestion by  
23 any of you?

24 If not, thank you for being here today, and we'll see  
25 you at 9:30 on Wednesday.

1 MR. TEANEY: Thank you, Your Honor.

2 MS. BAGNELL: Thank you, Your Honor.

3 THE CLERK: All rise.

4 (Proceedings concluded at 1:03 p.m.)

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## 1 CERTIFICATE OF OFFICIAL REPORTER

2 I, Catherine Schutte-Stant, Federal Official Realtime  
3 Court Reporter, in and for the United States District Court  
4 for the Southern District of West Virginia, do hereby  
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8 above-entitled matter and that the transcript page format is  
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12 s/Catherine Schutte-Stant, RDR, CRR

13 \_\_\_\_\_ February 5, 2018

14 Catherine Schutte-Stant, RDR, CRR  
15 Federal Official Court Reporter  
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